**[Cite as *In re A.B.*, 2010-Ohio-2823.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

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| IN THE MATTER OF: | : | |
| A.B. | : | CASE NO. CA2009-10-257 |
| | : | O P I N I O N<br>6/21/2010 |
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APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JS2006-0726

Traci Combs-Valerio, 240 East State Street, Trenton, Ohio 45067, for appellant, S.H.

Fiehrer & Fritsch, LLC, Lawrence P. Fiehrer, 10 Journal Square, Suite 400, Hamilton, Ohio 45011-3459, for appellee, D.B.

**HENDRICKSON, J.**

**{¶1}** Mother, S.H., appeals a child custody decision from the Butler County Court of Common Pleas, Juvenile Division. We affirm.[1]

**{¶2}** The parties in this case were married in 1993. The marriage produced two daughters, A.B. and C.B., who have been the subject matter of numerous proceedings initiated by both parties. In June 2003, mother filed for divorce. In March 2004, while

1. Pursuant to Loc.R. 6(A), this case is hereby removed, sua sponte, from the accelerated calendar and placed on this court's regular calendar.

the divorce was pending, the parties, as a result of mediation, entered into a shared parenting plan that was later incorporated into the divorce decree. Following the divorce, both parties remarried.

**{¶3}** Pursuant to the shared parenting plan, both parties acted as the residential parent while the children were in their possession, and the plan set forth a parenting schedule. In 2005, mother moved to modify the shared parenting plan based upon allegations of sexual abuse of A.B. by her stepmother. As a result of these allegations (and similar ones relating to A.B.'s stepfather), the Domestic Relations Court transferred the matter to the Butler County Juvenile Court for a determination of abuse, neglect and/or dependency. Prior to the abuse, neglect and/or dependency hearing, the parties stipulated that the children were dependent pursuant to R.C. 2151.04(C).

**{¶4}** On January 10, 2007, the parties entered into a new parenting plan, wherein the original parenting plan was modified to reflect that C.B. would now reside with father, and the parents would alternate weekend parenting time with A.B.[2] In addition, the children would spend half of their summers with each parent, rotating every two weeks.

**{¶5}** The instant appeal is a result of multiple motions, including but not limited to, both parties' motions to terminate the shared parenting plan and to be named the residential parent of A.B. During the hearing on the motions, the magistrate issued a preliminary ruling excluding all evidence relating to custody that predated the parties' last shared parenting plan dated January 10, 2007. The magistrate reasoned that prior to that date, the parties had ample opportunity to litigate any lingering claims, but instead entered the shared parenting plan contained in the January 10, 2007 orders.

**{¶6}** In June 2009, the magistrate terminated the parties' shared parenting plan,

and after a finding that it was in the children's best interest, granted father custody of both children and designated him as their residential parent. The magistrate granted mother non-residential parenting time with A.B. every other weekend, and on Mondays following the weekends that A.B. stayed with father. The magistrate also granted father's motions for contempt against mother for removing A.B. from court-ordered therapy sessions and denying father's parenting time. Mother filed objections to the magistrate's decision, which were overruled by the trial court. The trial court subsequently adopted the magistrate's decision in its entirety. Mother timely appeals, raising six assignments of error.

**{¶7}** Assignment of Error No. 1:

**{¶8}** "TRIAL COURT'S [SIC] ERRED IN FAILING TO ALLOW TESTIMONY REGARDING EVENTS PRIOR TO JANUARY 10, 2007 IN LOOKING AT THE BEST INTEREST OF THE CHILD."

**{¶9}** In her first assignment of error, mother argues that the magistrate improperly excluded all evidence of events that occurred prior to the previous shared parenting plan dated January 10, 2007. Specifically, mother argues that the trial court erred in excluding the testimony of Dr. Eckart Wallisch, M.A., a psychology assistant from the Children's Diagnostic Center whose 2006 report indicated that A.B.'s stepmother sexually abused her. The magistrate concluded that the parties could have fully litigated this issue at the January 2007 disposition hearing, but instead entered a shared parenting plan that permitted unsupervised contact between the children and their stepparents. Mother was, however, permitted to proffer Dr. Wallisch's report at the hearing, outside the presence of the magistrate.

**{¶10}** A trial court's decision to admit or exclude evidence will not be reversed

2. Any custody determinations regarding C.B. are not at issue in this appeal.

absent an abuse of discretion. *Mason v. Cave*, Warren App. No. CA2008-11-140, 2010-Ohio-208, ¶7. An abuse of discretion implies that the court's decision was unreasonable, arbitrary or unconscionable, and not merely an error of law or judgment. Id.

**{¶11}** Upon review of the record, we find that the trial court did not abuse its discretion in excluding unsubstantiated evidence relating to sexual abuse that allegedly occurred prior to January 10, 2007. The record reveals that as early as 2005, children's services conducted a meeting with all four parents, wherein they were told that "all allegations * * * [were] unsubstantiated and for everyone to quit throwing [them] out * * * It's done. It's over. Do not mention it again with any party, [and if] any party involved brings it up they will be prosecuted." Further, in her final decision and entry, the magistrate twice noted that the parties' claims of sexual abuse were wholly unsubstantiated and based solely upon conjecture and "innuendo."

**{¶12}** We fail to see how Dr. Wallisch's testimony would have substantially aided the trial court in making its decision concerning the best interests of A.B. Under the circumstances, we do not find that the trial court's decision to exclude this testimony, or other evidence predating January 10, 2007, was so arbitrary, unreasonable or unconscionable as to connote an abuse of discretion.

**{¶13}** Accordingly, mother's first assignment of error is overruled.

**{¶14}** Assignment of Error No. 2:

**{¶15}** "THE TRIAL COURT ERRED WHEN IT FOUND THAT CERTAIN FACTORS CONTAINED IN R.C. 3109.04(F)(1) WERE IN THE BEST INTEREST OF THE MINOR CHILD."

**{¶16}** Assignment of Error No. 3:

**{¶17}** "THE TRIAL COURT ERRED WHEN IT FOUND THAT CERTAIN

FACTORS IN R.C. 3109.051 WERE IN THE BEST INTEREST OF THE MINOR CHILD."

**{¶18}** Assignment of Error No. 5:

**{¶19}** "TRIAL COURT [SIC] ERRED WHEN IT FOUND THE CHILD'S BEST INTERESTS WERE SERVED BY A CHANGE OF CUSTODY WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

**{¶20}** In the interest of clarity, we will address mother's second, third and fifth assignments of error together, as they relate to the trial court's best interest determinations. Because both parties sought to terminate the shared parenting plan, the motions are governed by R.C. 3109.04(E)(2)(c). See *C.D. v. D.L.*, Fayette App. No. CA2006-09-037, 2007-Ohio-2559, ¶16. Mother now challenges the trial court's best interest determinations under R.C. 3109.04(F)(1) and R.C. 3109.051(D). Mother also argues that the change of custody over A.B. was against the manifest weight of the evidence.

**{¶21}** The standard of review in custody cases is whether the trial court abused its discretion in determining that shared parenting was no longer in the best interest of the parties' child. *Davis v. Flickinger*, 77 Ohio St.3d 415, 416-417, 1997-Ohio-260. See, also, *Lopez v. Lopez*, Franklin App. No. 04AP-508, 2005-Ohio-1155, ¶27; R.C. 3109.04(E)(2)(c). Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court. *Flickinger* at 418. A reviewing court must keep in mind that the trial court is better equipped to examine and weigh the evidence, determine the credibility, attitude and demeanor of witnesses, and make decisions concerning custody. See *D.L.*, 2007-Ohio-2559 at ¶14.

**{¶22}** R.C. 3109.04(E)(2)(c) provides: "[t]he court may terminate a prior final

shared parenting decree that includes a shared parenting plan approved under [R.C.] 3109.04(D)(1)(a)(i) upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared paring plan approved under [R.C.] 3109.04(D)(1)(a)(ii) or (iii) if it determines, upon its own motion or upon the request of one or both parties, that shared parenting is not in the best interest of the children."

**{¶23}** At this juncture, we point out that under the first part of R.C. 3109.04(E)(2)(c), a trial court may terminate a shared parenting plan approved under R.C. 3109.04(D)(1)(a)(i) simply upon the request of one or both of the parents. See *D.L.*, 2007-Ohio-2559 at ¶18. While a court may also terminate the shared parenting plan by finding that it is not in the best interest of the child, it is not required to so find before it can terminate the plan. Id. By contrast, under the second part of R.C. 3109.04(E)(2)(c), a trial court may terminate a shared parenting plan approved under R.C. 3109.04(D)(1)(a)(ii) or (iii) only if it determines that the plan is not in the best interest of the child. Id.

**{¶24}** During the pendency of their divorce, the parties jointly created a shared parenting plan through mediation, thus placing the parties' parenting plan under R.C. 3109.04(D)(1)(a)(i). Therefore, the trial court was not required to first find that shared parenting was not in the best interest of the children (even though it did) before it could terminate the shared parenting plan. See *D.L.*, 2007-Ohio-2559.

**{¶25}** Nevertheless, R.C. 3109.04(E)(2)(d) states that when a court terminates a shared parenting plan approved under R.C. 3109.04(D)(1)(a)(i), it must then "issue a modified decree for the allocation of parental rights and responsibilities under the standards applicable under divisions (A), (B), and (C) of this section as if no decree for

shared parenting had been granted and as if no request for shared parenting had ever been made." R.C. 3109.04(B)(1) further states that when allocating parental rights and responsibilities, a court must consider the children's best interests. See, also, *In re J.L.R.*, Washington App. No.08CA17, 2009-Ohio-5812, ¶33.[3]

**{¶26}** In the case at bar, the magistrate made numerous findings related to the best interest factors, including the following: (1) A.B. has a good relationship with both parents, and mother admits that A.B. "loves her father and is happy to see him"; (2) mother unilaterally cut off father's parenting time with A.B. in October 2008 and has "continuously and willfully denied father his parenting time pursuant to this court's orders" issued in January 2007; when mother cut off father's parenting time with A.B., the lack of time spent with C.B. was "damaging to both of the children"; (3) father has a stable lifestyle and his four bedroom home has separate bedrooms for the children; A.B.

3. **{¶a}** "R.C. 3109.04(F)(1) specifies the best interest factors, in addition to all relevant factors, that the court must consider:

**{¶b}** "(1) The wishes of the children's parents regarding the child's care;

**{¶c}** "(2) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

**{¶d}** "(3) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

**{¶e}** "(4) The child's adjustment to the child's home, school, and community;

**{¶f}** "(5) The mental and physical health of all persons involved in the situation;

**{¶g}** "(6) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

**{¶h}** "(7) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

**{¶i}** "(8) Whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

**{¶j}** "(9) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

has many friends in father's community; (4) A.B. has struggled in school and has had 13 absences, several of which mother could not explain; (5) mother continues to accuse A.B.'s stepmother of sexual abuse, and "consistently dramatizes and escalates situations, to the detriment of the child"; mother engaged in "tug of war" with stepmother over A.B. at the doctor's office, requiring police to escort mother off the premises; (6) mother's consistent "overreaction when confronted with negative circumstances" and misbehavior in the presence of her children created cause for concern regarding mother's mental health; (7) mother cancelled ten of A.B.'s therapist appointments, compared to three cancelled by father and subsequently withdrew A.B. from her therapist's care; (8) mother was found to be in contempt for denying father's court-ordered parenting time on at least seven occasions, thus concluding that father is more likely to honor or facilitate visitation; and (9) father is making regular payments on his child support arrearages.

**{¶27}** Additionally, R.C. 3109.04(F)(2) provides factors for a court to consider when determining whether shared parenting (as a form of custody) is in a child's best interest.[4] Without specifically referencing R.C. 3109.04(F)(2), the magistrate also made the following findings with regard to shared parenting that are closely related to the factors listed under that section: (1) the parties made no effort to cooperate in good faith or to communicate to avoid misunderstandings; (2) neither parent appeared willing to

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**{¶k}** "(10) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

4. **{¶a}** R.C. 3109.04(F)(2) provides:

**{¶b}** "(a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;

**{¶c}** "(b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;

**{¶d}** "(c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;

**{¶e}** "(d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

make accommodations to suit the other parent's needs; (3) there was little evidence that the parties would cooperate to make joint parenting decisions; (4) while both parents shared blame for the situation, mother's persistent pattern of denying father's parenting time with A.B. estranged the siblings and severed their sisterly bond; and (5) the parties live approximately 51 minutes apart.

**{¶28}** Finally, the magistrate made these additional determinations: (1) regarding mother's concerns that stepmother would sexually abuse A.B., the magistrate noted that there was "no evidence that stepmother has been determined to be a pedophile since the January 10, 2007 parenting orders, and no children's services worker, police officer or criminal convictions were presented to substantiate [mother's] claim. * * * [Mother's] only evidence is innuendo and vague conjecture, certainly not proof by even a preponderance of the evidence"; and (2) mother's claim that father would kidnap A.B. and move to Louisiana was similarly unsubstantiated because father's time in New Orleans had been temporary and was related to cleanup from Hurricane Katrina.

**{¶29}** In sum, the magistrate found mother's concerns to be "unwarranted, unfounded and irrational[.]" Thus, after reviewing the evidence, the magistrate concluded that granting legal custody of both children to father served their best interests.

**{¶30}** Mother argues that the following determinations under R.C. 3109.04(F)(1) are not supported by the evidence: (1) mother's refusal to permit visits between father and A.B. was "damaging to both of the children"; (2) the magistrate's "concerns" regarding mother's mental health; (3) father was the parent more likely to honor the

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**{¶f}** "(e) The recommendations of the guardian ad litem of the child, if the child has a guardian ad litem."

other parent's visitation time; and (4) mother continually denied father's parenting time. There is evidence in the record to support the magistrate's findings. First, father testified that before mother cut off his visitation with A.B., the siblings got along "very well," and father believed it was in the children's best interest to be raised under the same roof. Additionally, stepmother testified that since 2007, there was "hardly" a relationship between the siblings, and that it had become "strained." The weight and credibility of father and stepmother's testimony is reserved to the trial court and we will not second-guess its determination. See *Flickinger*, 77 Ohio St.3d 415.

**{¶31}** Furthermore, some evidence exists that mother's reactions to certain situations warranted the court's concern for her mental state, including evidence that mother engaged in "tug of war" over A.B. in a doctor's office, and "would not even let [A.B.] sit on the table by herself" while the doctor removed her cast. In addition, mother unilaterally removed A.B. from her court-appointed therapy sessions and denied the new counselor's request to obtain A.B.'s past records. Third, the magistrate clearly accounted for both parties' failure to follow the parenting orders, but noted that mother was previously found in contempt for denying father's parenting time. Lastly, the magistrate's conclusion that mother continually denied father's parenting time is clearly supported by mother's own testimony.[5]

**{¶32}** Finally, the record reflects that the hearing on this matter lasted two days, with numerous witnesses and almost 400 pages of testimony. Based upon the evidence provided, this court fully recognizes that both parties bear responsibility for their current situation. However, when "one parent begins to cut out another parent, especially one that has been fully involved in that child's life, the best interest of the child *is* materially

5. During the hearing, mother testified that she had been found in contempt for denying father parenting time, and regarding father's parenting time since 2008, mother stated that she "started denying [father] when they left the state and didn't let [mother] know where they were going."

affected." *Flickinger*, 77 Ohio St.3d at 419. (Emphasis in original.) Thus, mother's argument that the trial court's best interest determinations under R.C. 3109.04(F)(1) are not supported by the evidence is meritless.

**{¶33}** Mother presents a similar argument in her third assignment of error: the trial court erred in its determination that several factors under R.C. 3109.051(D) weighed in father's favor, instead of hers. Specifically, mother challenges the magistrate's findings under R.C. 3109.051(D)(7) and (D)(10), relating to the health and safety of A.B. and each parent's willingness to facilitate the other's parenting time. Mother argues that the trial court overlooked her motives for denying father's parenting time with A.B., which stemmed from her fears that father would abscond with A.B. to Louisiana and that stepmother was sexually abusing her. Second, mother argues that by failing to consider father's actions, the magistrate issued a "one-sided" conclusion that mother was the only parent unwilling to facilitate parenting time.

**{¶34}** In establishing a specific parenting time schedule, a trial court is required to consider the factors set forth in R.C. 3109.051(D)(1)-(16). *Anderson v. Anderson*, Warren App. No. CA2009-03-033, 2009-Ohio-5636, ¶24. After considering all of the factors listed in this section, the trial court, in its sound discretion, must determine what parenting time schedule is in the best interest of the child. Id. As previously stated, the trial court addressed mother's concerns regarding father's travel habits and stepmother's sexual conduct and concluded that these concerns were "unreasonable, unsubstantiated and irrational." Further, the court properly considered both parties' ongoing behavior in this case and recognized that neither party was the perfect parent.

**{¶35}** We continue to emphasize the deference we must accord trial court decisions involving the custody of children. In the case at bar, although father also engaged in "manipulative behavior with regard to these children," the court was faced

with two parents who, according to the guardian at litem, could not put their children's well-being before "their own self-interest." When parents divorce, courts are often forced to choose one parent over another, "and the decision may rest upon slight differences of opinion regarding the better overall environment for the child." *Wilson v. Wilson*, Lawrence App. No. 09CA1, 2009-Ohio-4978, ¶27. Appellate courts are ill-suited to make such decisions based on a cold record, whereas trial courts, where the evidence is presented and witnesses are evaluated, are more aptly suited to make them. Id. In the case at bar, the trial court's custody decision is supported by the record, and we decline to second guess the trial court in this matter. Thus, the trial court's termination of the shared parenting plan and designation of father as the children's residential parent and legal custodian did not constitute an abuse of discretion and was not against the manifest weight of the evidence.

**{¶36}** Accordingly, mother's second, third and fifth assignments of error are overruled.

**{¶37}** Assignment of Error No. 4:

**{¶38}** "MOTHER WAS DEPRIVED OF HER CONSTITUTIONAL RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL."

**{¶39}** In her fourth assignment of error, mother argues that her trial counsel was ineffective for failing to follow Loc.R. 51, which provides in relevant part:

**{¶40}** "Objection to the admissibility of any document will be deemed to be waived in any court hearing, other than delinquent child or criminal proceedings, under the following circumstances:

(1) "The document was provided to opposing counsel or the opposing party if pro se at least fourteen (14) days before the hearing, and

(2) "The party opposing introduction of the document into evidence has not filed a written objection to the introduction of the document at least seven (7) days before the hearing setting forth the particular objections raised."

**{¶43}** Mother states that "[o]ne of the first things you learn in law school is to read the rules. All of the rules – even the local rules." Mother argues that her trial counsel was deficient by failing to object to multiple hearsay documents, which resulted in their admission. Mother also argues that her counsel was deficient in failing to submit exhibits to opposing counsel at least 14 days prior to the scheduled hearing, causing some of mother's "most important evidence" to be excluded. We find no merit in this argument.

**{¶44}** A right to the effective assistance of counsel in a criminal proceeding is provided for under the Sixth Amendment to the United States Constitution. *Roth v. Roth* (1989), 65 Ohio App.3d 768, 776, citing *Strickland v. Washington* (1984) 466 U.S. 668, 686, 104 S.Ct. 2052, 2063. However, all motions in this case are civil matters. A party in a civil action enjoys no constitutional right to representation. *Luna-Corona v. Esquivel-Parrales*, Butler App. No. CA2008-07-175, 2009-Ohio-2628, ¶42. Accordingly, "an unsuccessful civil litigant whose attorney has fallen below the professional standard of representation may recover losses caused by the deficiency in an action for legal malpractice against his attorney, but has no right to subject the opposing party to a new trial." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 126, 1997-Ohio-401 (Cook, J., concurring in judgment only).

**{¶45}** Mother's fourth assignment of error is overruled.

**{¶46}** Assignment of Error No. 6:

**{¶47}** "MAGISTRATE [SIC] FAILED TO BALANCE THE HARM TO THE CHILD CAUSED BY A CHANGE IN THE ENVIRONMENT WEIGHED AGAINST ANY

ADVANTAGES OF THE CHANGE."

**{¶48}** In her final assignment of error, mother argues that the trial court erred when it found a change in circumstances and granted legal custody of A.B. to father, but failed to weigh the harm associated with a change in A.B.'s environment. However, this court has held that a trial court is not required to find a change in circumstances before *terminating*, rather than modifying, a shared parenting plan. *D.L.*, 2007-Ohio-2559 at ¶19; *A.S. v. D.G.*, Clinton App. No. CA2006-05-017, 2007-Ohio-1556, ¶31. Additionally, a trial court is not required to balance the harm of an environment change against its advantages in order to terminate a shared parenting plan. *D.L.* at ¶19. Thus, the trial court's findings relating to a change in circumstances and the balance between the harm of an environment change and its advantages were dicta, and we need not reach this issue on appeal.

**{¶49}** Mother's sixth assignment of error is overruled.

**{¶50}** Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.